Allied Medical Transport, Inc. *and* Transport Workers Union of America, AFL–CIO. Cases 12–CA–072141, 12–CA–072148, and 12–CA–074078

July 2, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On January 16, 2013, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and supplemental exceptions with supporting argument, the General Counsel filed an answering brief, and the Respondent filed a reply brief. Further, the General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions in part and to reverse them in part, and to adopt the recommended Order as modified and set forth in full below.[2]

We agree with the judge, for the reasons stated in his decision, that the Respondent committed multiple violations of Section 8(a)(1).[3] Contrary to the judge, we find that the evidence fails to establish that the Respondent unilaterally changed its fare-shortage policies in violation of Section 8(a)(5) and (1), but does establish that the Respondent unlawfully suspended and terminated employees Renan Fertil and Yvel Nicolas in violation of Section 8(a)(3) and (1).

I. FACTS

In 2010, the Respondent, Allied Medical Transit, Inc., contracted with Broward County, Florida to provide nonemergency transportation services to Americans with Disabilities Act (ADA)-qualified residents. On a daily basis, the Respondent provided each of its drivers with a manifest from Broward County listing the driver's assigned route, the pick-up and drop-off times for each scheduled passenger, and the names of those passengers who were required to pay a $3.50 fare. Pursuant to the Respondent's employee handbook, drivers account for their collected fares by marking on the manifest the amount paid by each passenger, depositing all of their fares into the Respondent's fare validating machine, stapling the receipt from the machine to the manifest, and returning both to the Respondent. The Respondent kept the collected fares and received a "trip fee" from Broward County for each transport.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The complaint alleged that the Respondent, through its chief executive officer, Wayne Rowe, unlawfully directed employees to vote against the Union. Although the judge failed to address this allegation, he expressly credited employee Andrys Etienne's testimony that he and Rowe had the following exchange the day before the representation election:

> [Rowe] asked me if —he tell me, "[I]f you don't go to vote, the Union is going to win." I say, "I'm not going to vote." He say, "[I]f you don't vote, the Union is going to win. If you vote, you have to vote no." "No," I say, "I'm not going to vote no, but you don't have to. I work for almost two years, no vacation. Then soon as we have --you know, go to return my test, you don't want to pay for my test, so I can't vote for you, yes for you." He say, "[T]hat's why I have a meeting last night. Give me some time to fix everything." I say --he say that he's the one that has the future from the County, is the one that can help us. I say, "[B]ut we work for you for a long time, you don't do nothing for us." He say, "[G]ive me some time." [A]nd in the conversation I say I was busy, I don't think I'm going to go to vote. He say, "[Y]ou have to go to vote." I say, "[O]kay, I'm going to vote." He say, "[B]ut if you go to vote, you have to vote no."

(Tr. 57; quotation marks added). Considering the entire conversation and the context, we agree with the General Counsel that Rowe, in violation of Sec. 8(a)(1), coercively directed Etienne to vote against the Union. See *Union Valley Iron & Steel Co.*, 224 NLRB 866, 876 (1976) (employer violated Sec. 8(a)(1) when a supervisor, on the day of a representation election, instructed an employee "to vote for the company").

[2] We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014). We shall also amend the judge's conclusions of law and remedy consistent with our findings herein.

[3] Specifically, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by (1) creating the impression among employees that it was engaging in surveillance of their union or other protected concerted activities; (2) engaging in surveillance of employees' union or other protected concerted activities; (3) telling employees that it would be futile for them to select the Union as their collective-bargaining representative; (4) interrogating employees about their union or other protected concerted activities; (5) soliciting and impliedly promising to remedy employees' grievances in order to discourage them from selecting the Union as their collective-bargaining representative; (6) soliciting employees to campaign against the Union; (7) expressly promising employees benefits in order to discourage them from selecting the Union as their collective-bargaining representative; (8) impliedly promising employees unspecified benefits in order to discourage them from selecting the Union as their collective-bargaining representative; and (9) threatening to replace employees with part-time drivers if they selected the Union as their collective-bargaining representative.

In June 2011,[4] Broward County amended its contract with the Respondent to deduct the collected passenger fares from the trip fees it paid to the Respondent. In August, Wayne Rowe, the Respondent's chief executive officer, realized that the contract modification was costing the Respondent a "vast amount" of money because of purported discrepancies between the fares collected and the amounts remitted to the Respondent by its drivers. In response, the Respondent initiated an audit comparing the daily manifests and fare validating machine receipts of a few of its drivers to determine whether they were depositing all of their collected fares as set forth in the employee handbook. This audit began in August 2011 and spanned the period from March to October 2011. Shortly thereafter, the Respondent commenced a second, more comprehensive audit of all drivers that covered the period of March to December 2011.[5]

By October, Rowe concluded from the initial audit that several drivers had failed to turn in all of their fares. Rowe issued warnings to these drivers and required them to repay the amounts allegedly owed. Two drivers, Jude Desir and Andrys Etienne, initially refused to pay and claimed that they had turned in all of their collected fares to Supervisor Clive Plummer. On October 21, Rowe told Desir and Etienne that the Respondent would investigate their claims and that they would be responsible for repaying the missing money if he determined that they had not turned in all of their collected fares. Rowe did not discipline or suspend either Desir or Etienne pending the results of the investigation.

On October 26, the Transport Workers Union of America, AFL–CIO (Union) filed a petition to represent the Respondent's drivers, dispatchers, and mechanics. The Respondent, and CEO Rowe in particular, conducted a vigorous antiunion campaign during which it committed multiple violations of the Act. On December 2, the Union won the representation election. Several days after the election, the Respondent concluded its second audit.

By letter dated December 13, Rowe informed Desir that Supervisor Plummer had denied receiving the more than $2000 that Desir allegedly owed, which included fares reflected on Desir's manifests, but for which there was no record of Desir remitting any money. The letter stated that the Respondent would "be including the police to conclude the investigation" but that Desir did not have to repay the money because of his continued insistence that he had given it to Plummer. Nonetheless, Rowe required Desir to pay $76.50, plus interest, for those days on which receipts from the Respondent's fare validating machine checked against Desir's manifest indicated that he had deposited only some of his collected fares. The same day that the Respondent presented Desir with the letter, Rowe notified Etienne that because he had failed to properly follow the Respondent's procedures for depositing his fares, he had to repay over $1000, including interest, for the missing fares. Etienne insisted that he had deposited all of his fares, but, to keep his job, he agreed to repay the money.

Also on December 13, Rowe informed driver Yvel Nicolas that he had a fare delinquency for the previous week. Nicolas responded that the fare validating machine sometimes failed to work and, in those instances, he placed all of his collected fares in an envelope and dropped the envelope into the fare validating machine's coin deposit slot, similar to a mail slot, without obtaining any receipt. Nicolas suggested that Rowe could verify that he had no delinquencies by comparing his manifests to the envelopes themselves, on which Nicolas had written the amounts of the collected fares. Rowe replied that he could not check Nicolas's manifests and the envelopes, but would conduct an investigation. The following day, in response to Nicolas's renewed request for Rowe to check his manifests and the envelopes in which he deposited his fares, Rowe said, without explanation, that he could not do that, but he promised to continue the investigation.

On December 21, Rowe met with driver Renan Fertil to notify him that he owed $433 in delinquent fares, plus interest. Like Nicolas, Fertil explained that the Respondent's fare validating machine did not always work: sometimes, it would not take the dollar bills he tried feeding into it. On such occasions, he placed all of the money in an envelope that he deposited through the machine's coin slot without obtaining a receipt. Fertil also stated that some shortages resulted from passengers' refusal to pay the fare in full or at all. While admitting that he might have made an occasional mistake, Fertil denied owing the entire $433 alleged by Rowe. The Respondent showed Fertil his December 14 manifest showing a fare shortage of $7. Fertil agreed to repay the $7, and he told Rowe that he would repay all of the alleged delinquencies but that he first wanted to see copies of his daily manifests showing the alleged delinquencies. Rowe refused to show Fertil the manifests or the receipts. Instead, Rowe told Fertil that he would be suspended while the Respondent conducted an investigation. On December 26, the Respondent informed Fertil that he would "be placed on suspension while we further our investigation

[4] All dates are in 2011 unless otherwise noted.

[5] In November, the Respondent hired a temporary employee, Ronan Defranc, to assist the Respondent's archivist, Yhaneek Williams, in conducting the second, more comprehensive audit of all its drivers. Rowe supervised the auditing process.

and gather all necessary documents. If it is proven that you do owe these monies you will be responsible for paying it back or criminal charges will be bought against you and at that time we will make a determination whether or not we wish to continue your employment." The Respondent conducted no further investigation; instead, it turned the matter over to the Hollywood, Florida Police Department. The Respondent then discharged Fertil for job abandonment because he failed to pay the alleged delinquent fares. The police filed no charges against Fertil.

On December 26, Rowe summoned Nicolas to the Respondent's office, informed him that his delinquency totaled $226.50, plus interest, and instructed him to pay that amount. Nicolas insisted that he had deposited all of his collected fares, and again requested a copy of his manifests, receipts, and envelopes in order to prove to Rowe that he did not owe any money. Rowe stated he was going to suspend Nicolas and that the Respondent would continue its investigation during Nicolas's suspension. The next day, the Respondent issued Nicolas a letter stating: "You state that you have always dropped all the fare monies so you will be placed on suspension while we further our investigation and gather all necessary documents. If it is proven that you do owe these monies you will be responsible for paying it back or criminal charges will be bought against you and at that time we will make a determination whether or not we wish to continue your employment." As with Fertil, the Respondent conducted no further investigation of Nicolas, but instead turned the matter over to the Hollywood Police Department, which did not file any charges. The Respondent discharged Nicolas for failing to pay the fares that he allegedly owed. Although some drivers whom the Respondent approached about fare delinquencies voluntarily left their jobs and never returned, Fertil and Nicolas were the only two drivers the Respondent suspended and terminated for a first offense of allegedly failing to deposit all their collected fares.

II. SECTION 8(A)(5) ALLEGATION

The judge found that the Respondent violated Section 8(a)(5) by significantly tightening enforcement of its preexisting fare shortage policies and procedures, when "it abruptly went from a loose system, where drivers' fare submissions were generally not policed, audits were infrequent and limited in scope, and few drivers were subjected to discipline; to one where all fare submissions for a 10-month period were scrutinized under a comprehensive audit." In excepting to the judge's finding, the Respondent notes that it began both of its audits prior to the employees' selection of union representation, at a time when it had no duty to bargain and therefore could not have violated Section 8(a)(5).

We agree with the Respondent and reverse the judge's finding. The record shows that, in response to requirements in its revised contract with Broward County, the Respondent initiated its comprehensive audit of all of its drivers in the summer of 2011, well before the December 2 election. See *Consolidated Printers*, 305 NLRB 1061, 1061 fn. 2, 1067 (1992) (no duty to bargain over decisions made prior to the union's election as the bargaining representative). Accordingly, the Respondent had no duty to bargain over the decision to conduct the audits, irrespective of whether those audits would have constituted a material, substantial, and significant change to the bargaining unit's terms and conditions of employment.

The General Counsel cross-excepts to the judge's failure to find that the Respondent unilaterally modified its work rules in late December by suspending employees Nicolas and Fertil for their alleged fare shortages pending the Respondent's investigations. The General Counsel asserts that, prior to the Union's election victory in December, the Respondent had no policy or established past practice of suspending employees pending an investigation. In support, the General Counsel points to employees Desir and Etienne, whom the Respondent investigated for similar delinquencies in October but did not suspend. We find, however, that the Respondent's treatment of those two employees fails to demonstrate that the Respondent had an established past practice of not suspending employees pending investigation or that it departed from that practice when disciplining employees Fertil and Nicolas. Employees Desir and Etienne were among the first drivers that the Respondent audited and approached about repaying delinquent fares. That Desir and Etienne were not suspended, in this context, is insufficient to demonstrate a settled practice. Accordingly, the General Counsel has failed to establish that the Respondent's suspension of Nicolas and Fertil pending the Respondent's investigations was an unlawful unilateral change. See *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988) (no unilateral change where the General Counsel failed to demonstrate the existence of an established past practice or understanding).

III. SECTION 8(A)(3) ALLEGATIONS

Although the suspensions of Nicolas and Fertil pending disciplinary investigations are not violative of Section 8(a)(5), the suspensions as well as the discharges are unlawful under Section 8(a)(3). The proper framework for determining whether the suspension and discharge of Fertil and Nicolas violated Section 8(a)(3) is the burden-shifting analysis set forth in *Wright Line*, 251 NLRB

1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983). The General Counsel has the initial burden to show that the employee's protected activity was a motivating factor for the adverse action by demonstrating: (1) the employee's protected activity, (2) the employer's knowledge of that activity, and (3) the employer's antiunion animus. See *Austal USA, LLC*, 356 NLRB No. 65, slip op. at 1 (2010); *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). The burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. *Consolidated Bus Transit*, 350 NLRB at 1066.

We agree with the judge that the General Counsel satisfied his initial burden. Fertil solicited and obtained union authorization cards, distributed union flyers, attended union meetings, wore a union T-shirt, and spoke to his coworkers about supporting the Union. Moreover, there can be no doubt that the Respondent knew of Fertil's union activity because his immediate supervisor witnessed Fertil, alongside the Union's lead organizer, distributing union literature to his fellow drivers. Not only did Nicolas engage in the same union activities as Fertil, but Nicolas also served as an election observer for the Union, which the Respondent indisputably knew. Lastly, there is extensive evidence of the Respondent's union animus as demonstrated by Rowe's numerous unlawful threats and actions directed against multiple employees, including Nicolas.

Notwithstanding the finding that the General Counsel satisfied his initial burden, the judge determined that the Respondent met its burden of proving, by a preponderance of the evidence, that it would have suspended and discharged Fertil and Nicolas in the absence of their union activities. On this point, we disagree with the judge.

The Respondent claimed that it suspended and discharged Fertil and Nicolas for their fare delinquencies, not for their union activity. To satisfy its burden, the Respondent must prove that it acted on a reasonable belief that Fertil and Nicolas were, in fact, guilty of that transgression when it suspended and discharged them. For example, in *Midnight Rose Hotel & Casino, Inc.*, 343 NLRB 1003, 1004 (2004), enfd. 198 Fed. Appx. 752 (10th Cir. 2006), an employer terminated a waitress for theft after conducting a payroll audit and determining that she had at times been improperly paid at the higher bartender wage rate. The Board held that the employer's "failure to conduct a fair investigation and its failure to give [the waitress] an opportunity to explain her actions before imposing discipline defeat its claim of reasonable belief that [the waitress] was engaged in theft." Id. at 1005; see also *Alstyle Apparel*, 351 NLRB 1287, 1288 (2007) (employer's limited investigation and failure to permit discharged employees to defend themselves against allegations of misconduct "support the conclusion that the discharges were discriminatorily motivated and not, as the [employer] asserts, based on a reasonable belief of misconduct").

Here, despite Fertil's and Nicolas' insistence that they had properly remitted their collected fares, the Respondent refused to verify the accuracy of its audit summaries or to grant Fertil's or Nicolas' requests to review their manifests and any receipts and envelopes.[6] Instead, the Respondent told each of them orally and in a written notice that it would investigate their claims during their

[6] Our dissenting colleague notes that the Respondent's manager, Diandre Hernandez, testified that Nicolas's "denial [of owing delinquent fares] was implausible, given that the fare collection machine accurately counted submitted moneys." Both Fertil and Nicolas explained to the Respondent, however, that the machine sometimes failed to work at all, preventing them from feeding any paper money into the machine—a different contention than that the machine did not accurately count submitted moneys. They added that when that happened, their only option was to place the money in an envelope and deposit it through the coin slot, a procedure that did not create a receipt. Contrary to our colleague's assertion, the judge made no credibility determination regarding Hernandez' testimony. Instead, our colleague infers that the judge credited Hernandez' testimony based on the judge's finding that the Respondent's "records demonstrated that Fertil and Nicolas were guilty of the underlying fare transgressions." But even though the Respondent's audit summaries indicated that Fertil and Nicolas had fare delinquencies, those audit summaries do not refute Fertil's and Nicolas' explanation that the machine sometimes failed to work. This unresolved discrepancy is exactly why the Respondent's promised investigation of Fertil's and Nicolas' fare delinquencies was so important. The Respondent's failure to make good on its promise prevents it from satisfying its burden of showing that it had a reasonable belief that Fertil and Nicolas were, in fact, guilty of failing to deposit their collected fares. We agree with our colleague that any problems with the fare validating machine would have affected employees generally, and the fact that the Respondent's audit revealed discrepancies between the manifests and machine receipts for more than 70 other drivers lends credence to Fertil's and Nicolas' assertions that the fare validating machine did not always work.

We disagree with our colleague's statement that Fertil and Nicolas were given ample opportunity to pay but failed to do so. The Respondent's own records show that both employees offered to repay some or all of the amount owed. Fertil agreed to repay the $7 he owed for December 14, and offered to repay the remainder of his delinquencies after he saw copies of his daily manifests showing the alleged delinquencies. The Respondent never showed Fertil that proof. As to Nicolas, the judge found that Hernandez "stated that Nicolas initially committed to repaying the deficient moneys." Indeed, Hernandez prepared the notes on Nicolas' audit summary that stated: "On the second day Mr. Yvel [Nicolas] came Into the office, and he still continues to say he turned in all his monies but he wants to pay whatever he is short even though he denies being short. Mr. Yvel [Nicolas] was advised that the police will investigate the matter and he will be placed on suspension until the results of the investigations."

suspension and that it would not discharge them unless the investigations proved that they had failed to remit their collected fares. Rowe testified, however, that the Respondent did not conduct any further investigation and instead turned the matter over to the police. In light of Fertil's and Nicolas' repeated insistence that they had deposited their collected fares, the Respondent's failure to conduct the promised investigation undermines its position that it acted on a reasonable belief in suspending and discharging Fertil and Nicolas and supports the conclusion that the Respondent's actions were unlawfully motivated.[7]

In addition to its failure to investigate, the Respondent treated Fertil and Nicolas differently than other employees, in particular Desir and Etienne. In October, when Rowe confronted both Desir and Etienne about alleged fare delinquencies, he permitted both to continue working while he conducted an investigation. Shortly after the election, however, Rowe provided no similar opportunity to active union supporters Fertil and Nicolas, both of whom he suspended pending an investigation.[8] Based on this disparate treatment and the Respondent's failure to investigate, we find that the Respondent failed to show that it would have suspended and discharged Fertil and Nicolas in the absence of their union activities and, therefore, violated Section 8(a)(3).

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's conclusion of law 3

"3. The Union is, and at all material times was, the exclusive bargaining representative for the following appropriate unit:

> All full-time and regular part-time drivers, mechanics and dispatchers employed at the Respondent's Pompano, Florida facility, excluding all other employees, including security guards, confidential employees, and supervisors as defined in the Act."

2. Insert the following after the judge's conclusion of law 4(i):

"j. Instructing an employee to vote against union representation."

3. Delete the judge's conclusion of law 5 and substitute the following in its place:

"5. The Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Renan Fertil and Yvel Nicolas because of their support for and activities on behalf of the Union."

[7] We take issue with our dissenting colleague's claim that, simply by conducting its audit, the Respondent investigated whether Fertil and Nicolas had failed to deposit all of their collected fares. The Respondent's audit of its drivers was not in any way an investigation of Fertil's and Nicolas' assertions that they had remitted their fares and that the Respondent's machine sometimes failed to work. In fact, the Respondent gave repeated assurances to both Fertil and Nicolas that it would conduct an investigation after it had completed its two audits. Moreover, the Respondent informed both drivers in their suspension letters, which it issued after the audits, that their future employment with the Respondent would be in jeopardy only if the investigation proved that they had failed to deposit their collected fares. Hence, even the Respondent acknowledged that its audit alone did not prove that Fertil and Nicolas had stolen their fares, as the dissent claims they had.

It follows then that our dissenting colleague conflates the Respondent's audit with its promise to investigate Fertil's and Nicolas' assertions that they had deposited their collected fares. Rowe explicitly conceded that there was, in fact, no investigation after the drivers were suspended. The Respondent's decision not to conduct its promised investigation raises a serious doubt that it acted on a reasonable belief that Fertil and Nicolas had misappropriated their collected fares when it suspended and terminated them. As explained below, this failure to investigate Fertil's and Nicolas' claims is also in stark contrast to the Respondent's willingness to investigate Desir and Etienne's claims, just 2 months earlier, that the audit's findings were wrong because they had turned in their allegedly delinquent fares to a supervisor.

[8] Our dissenting colleague contends that the Respondent treated all drivers found to have "pocketed fares" consistently by either requiring them to admit liability and repay what was owed or leave the Respondent's employ by resigning or being fired. He also states that there is no evidence that the Respondent revisited its audit for any other drivers. This ignores the Respondent's treatment of Desir and Etienne—both of whom disputed the Respondent's contention that they had failed to turn in all of their collected fares. In response to Desir's and Etienne's claims, the Respondent conducted an investigation and permitted both to continue working while doing so. As a result of its investigation, the Respondent reduced the amount Desir had to pay from $2249.50 to $84.15 because of conflicting accounts that the Respondent discovered during its investigation. By substantially reducing Desir's required payment, the Respondent acknowledged that its audit might not have accurately stated the amount that Desir owed. Our colleague contends that Desir and Etienne are not similarly situated to Fertil and Nicolas because they claimed to have submitted the fares to a supervisor, which might not have been detectable by the audit. But Fertil's and Nicolas' insistence that they sometimes made fare deposits into the machine's coin slot but did not obtain a receipt also might not have been detectable by the audit. Instead of conducting its promised investigation and determining the legitimacy of Fertil's and Nicolas' assertions, the Respondent decided against treating these two known union supporters the same as Desir and Etienne, two similarly situated employees who disputed the results of the Respondent's audit and were not suspended during the Respondent's investigation.

As mentioned above, the General Counsel failed to show the Respondent had an established past practice of not suspending employees pending an investigation, despite the Respondent's decision in October not to suspend Desir and Etienne while it investigated their fare delinquencies. Nonetheless, while the General Counsel did not show a practice ubiquitous enough for the Respondent to have made an unlawful unilateral change under an 8(a)(5) analysis, the General Counsel did demonstrate that the Respondent treated two known union supporters, Fertil and Nicolas, disparately by suspending them purportedly pending their investigations. That evidence proves unlawful motive for Sec. 8(a)(3) purposes. See *Pollock Elec., Inc.*, 349 NLRB 708, 709 (2007) (employer engaged in disparate treatment by having discharged a union supporter while only suspending, pending an investigation, another employee who engaged in effectively the same conduct).

AMENDED REMEDY[9]

Having found that the Respondent coercively directed an employee to vote against the Union, we shall order it to cease and desist from that conduct.

Further, having found that the Respondent unlawfully suspended and discharged Renan Fertil and Yvel Nicolas, we shall order it to offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from the respective dates of their suspensions and discharges to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily under *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). The Respondent shall compensate Fertil and Nicolas for the adverse tax consequences, if any, of receiving lump-sum backpay awards and shall file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

Finally, because a significant number of the Respondent's employees speak Haitian Creole, we find merit in the Acting General Counsel's contention that the notice should be posted in English, Haitian Creole, and such other languages as the Regional Director determines are necessary to fully communicate with employees. We shall modify the recommended Order accordingly. See *O.G.S. Technologies, Inc.*, 356 NLRB No. 92, slip op. at 7 (2011).

ORDER

The National Labor Relations Board orders that the Respondent, Allied Medical Transport, Inc., Pompano, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(b) Placing employees under surveillance while they engage in union or other protected concerted activities.

(c) Threatening employees that selecting a union representative would be futile.

(d) Coercively interrogating employees about their union or other protected concerted activities.

(e) Soliciting and impliedly promising to remedy employees' grievances in order to discourage them from selecting the Union as their collective-bargaining representative.

(f) Soliciting employees to campaign against the Union.

(g) Expressly promising employees benefits in order to discourage them from selecting the Union as their collective-bargaining representative.

(h) Impliedly promising employees unspecified benefits in order to discourage them from selecting the Union as their collective-bargaining representative.

(i) Threatening to replace employees with part-time drivers if they selected the Union as their collective-bargaining representative.

(j) Instructing employees to vote against union representation.

(k) Suspending, discharging, or otherwise discriminating against employees because of their support for and activities on behalf of the Transport Workers Union of America, AFL–CIO, or any other labor organization.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Renan Fertil and Yvel Nicolas full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Renan Fertil and Yvel Nicolas whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(c) Compensate Fertil and Nicolas for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for Fertil and Nicolas.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions

[9] There are no exceptions to the judge's recommendations for a broad cease-and-desist order and a public reading of the notice, and we find both remedies appropriate here. A broad cease-and-desist order is warranted because the Respondent "has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357 (1979). The Respondent committed ten separate violations of Sec. 8(a)(1) during a union organizing campaign and terminated two known union supporters in retaliation for their union activity immediately following the Union's certification as the bargaining representative in violation of Sec. 8(a)(3). We further agree that a public reading of the notice is appropriate in light of the Respondent's numerous serious unfair labor practices, which were committed by a high-ranking management official. Reading the notice serves as a minimal acknowledgement of the obligations that have been imposed by law and provides employees with some assurance that their rights under the Act will be respected in the future. See, e.g., *Homer D. Bronson Co.*, 349 NLRB 512, 515–516 (2007), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008).

and discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, physically post at its Pompano, Florida facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 12, in English, Haitian Creole, and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be physically posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 26, 2011.

(g) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which will be scheduled to ensure the widest possible attendance of drivers, mechanics, and dispatchers, at which time the attached notice marked "Appendix" is to be read to employees by a responsible official of the Respondent in the presence of a Board agent, or, at the Respondent's option, by a Board agent in the presence of such an official, and shall also be read, by interpreters, in Haitian Creole and such other languages as the Regional Director determines are necessary.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 2, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

I respectfully dissent from the finding that the Respondent violated Section 8(a)(3) by discharging drivers Renan Fertil and Yvel Nicolas, who, the evidence shows, the Respondent reasonably believed were stealing fares along with more than 70 other drivers. The Respondent discovered the extent of its fare-theft problem as a result of two audits, the second one a massive and costly review conducted by an outside auditor.[1] There is no allegation that the audits were in any way connected to employees' union activities. The second audit, covering all drivers over a period of eight months, involved reviewing, among other things, the drivers' daily manifests, which identified passengers required to pay a $3.50 fare. By matching drivers' daily manifests against their fare-deposit receipts, the auditor found that Fertil, Nicolas, and many others had collected more than they had deposited.

When Fertil and Nicolas were caught, they argued that the Respondent should go back and pull the daily manifests underlying the audit to prove that they owed what the Respondent claimed. Neither employee offered any good reason to question the reliability of the audit as to him. Both of them blamed the discrepancies on a defective fare collection machine, but Manager Diandre Her-

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] The judge found that the "scope of this audit was so significant that [Respondent's CEO] W. Rowe needed to hire an outside contractor to perform it because his in-house staff was incapable," and that it hired an outside auditor, Ronan Defranc, in November 2011, to perform the second phase of the audit.

nandez testified that this was implausible.[2] The Respondent treated all drivers found to have pocketed fares consistently: those who admitted liability and repaid their delinquency remained employed; those who did not resigned or were fired.[3] So, too, Nicolas and Fertil: they were given ample opportunity to repay, failed to, and like other employees who refused to repay, they were suspended and fired.[4]

Applying *Wright Line*,[5] the judge found that the General Counsel established that Fertil's and Nicolas' union activities were a motivating factor in their discharges, but that the Respondent carried its burden of showing that it would have taken the same actions against them even in the absence of their union activity. I need not pass on the first of these findings because, even assuming the General Counsel sustained his initial *Wright Line* burden, I agree with the judge that the record shows that the Respondent would have taken the same actions without regard to any union activity.[6] As the judge correctly found, (i) the Respondent undertook the fare audit for sound business reasons unconnected to the union organizing drive, (ii) the audit revealed that Fertil and Nicolas were guilty of stealing fares, (iii) Fertil and Nicolas were given ample opportunity to make restitution, (iv) they failed to do so, and (v) they were treated the same as other drivers who refused to pay.

Although my colleagues find the Respondent lacked a reasonable belief that Fertil and Nicolas owed money, the record establishes—consistent with the judge's findings—that Fertil and Nicolas failed to turn in fares, as the audit revealed. Nor do I believe the record supports a finding of unlawful motivation because of the Respondent's "failure" to "investigate" further when Fertil and Nicolas demanded to see their daily manifests. The Respondent had *already* investigated, it clearly had a serious, bona fide problem that warranted its actions, and it treated Fertil and Nicolas just like other employees who were considered to have engaged in similar offenses.[7] When an employer disciplines employees following an investigation that reveals that the employees engaged in theft, the Act does not require the employer to take every further investigative step insisted upon by the offenders. The Respondent here conducted an extensive and costly audit, pulling months of daily manifests and receipts for each of its approximately 120 drivers. The results of the audit were set forth in a 131-page report detailing every instance, for every driver, of a failure to turn in fares during the audit period.[8] Fertil and Nicolas made blanket

[2] The judge implicitly credited Hernandez' testimony that Fertil and Nicolas advanced an implausible excuse for their fare deficiencies (blaming the operation of the fare collection machine). The judge cited this testimony by Hernandez in his decision, and found that Fertil and Nicolas "were guilty of the underlying fare transgressions." Nor does the record provide any support for my colleagues' theory that the large number of employees implicated in theft, as revealed by Respondent's extensive audit, somehow reinforces the assertion by Fertil and Nicolas that the fare machine did not work. To the contrary, there is overwhelming evidence that the Respondent discovered a massive theft problem confirmed in an audit conducted at considerable expense. Not only did the judge explicitly find that a large numbers of drivers, including Fertil and Nicolas, engaged in theft, this was *admitted* by many drivers whose misconduct was uncovered in the audit. Moreover, even if one disregards the fact that the record provides no support for finding that discrepancies were attributable to a faulty fare machine and the Respondent incorrectly dismissed this possibility, such a finding would be immaterial in the instant case, since large numbers of employees—not merely Fertil and Nicolas—were believed to have engaged in theft. Any problem with the fare collection machine would have affected employees generally, without regard to whether they engaged in protected activity, which makes it unreasonable to suggest this could somehow prove the existence of unlawful discrimination against Fertil and Nicolas.

[3] The judge found that seven drivers were discharged or quit as a result of the two audits. Subsequently, the Respondent held in abeyance, at the Union's request, the discipline of most of the delinquent drivers pending negotiations.

[4] Although my colleagues do not agree that Fertil and Nicolas had ample opportunity to repay their fare delinquencies, the record establishes that 5 days elapsed between the notice of delinquency given to Fertil and his suspension, and an even longer time elapsed for Nicolas. (These periods of time are also described in the majority opinion's statement of facts.) There is no evidence that Fertil and Nicolas were given less time to repay their fare delinquencies than other drivers who were similarly situated.

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[6] According to the majority, the General Counsel satisfies his initial burden under *Wright Line* with evidence of protected activity, employer knowledge of that activity, and antiunion animus. I disagree with that formulation. Generalized antiunion animus does not satisfy the General Counsel's initial burden under *Wright Line* absent evidence that the challenged adverse action was motivated by antiunion animus. As stated in *Wright Line* itself, the General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct *was a 'motivating factor' in the employer's decision*." 251 NLRB at 1089 (emphasis added).

[7] In support of their failure-to-investigate rationale, the majority relies on inapposite cases. In *Midnight Rose Hotel & Casino*, 343 NLRB 1003 (2004), enfd. 198 Fed. Appx. 752 (10th Cir. 2006), the employer discharged the lone remaining union activist in its work force purportedly for wage theft, where the employee made timekeeping errors the judge found were the result of confusion, not bad intent. In *Alstyle Apparel*, 351 NLRB 1287 (2007), the employer fired several employees purportedly for horseplay based on ambiguous and inconsistent reports. Here, the Respondent conducted an exhaustive investigation. It simply declined to reinvestigate without reasonable cause to do so.

[8] Nothing in the record casts doubt on the accuracy of the audit document itself, the auditing procedures, or the judge's finding that Fertil and Nicolas owed the money as shown in the audit. Nonetheless, the General Counsel contends on brief that the Respondent should have also introduced the voluminous manifests upon which the audit was based. Tellingly, however, counsel for the General Counsel represented during the hearing that she would be reviewing those documents, and she reserved the right to recall CEO Rowe for further questioning based on her inspection. She was thereafter silent about her review, did

demands to see the manifests, but they did not present any plausible reason for the Respondent to revisit the audit's findings.

My colleagues fault the Respondent for telling Fertil and Nicolas that they were suspended pending further investigation, when the record does not reveal that the Respondent took further investigative action. But what matters is whether the evidence proves that the Respondent's ultimate action—i.e., the decision to discharge these two offenders—was based on unlawful considerations rather than the Respondent's reasonable belief that the two employees engaged in theft. Nothing in the record suggests that the Respondent had a reason to investigate further, especially given that nothing suggests the Respondent's audits were a pretext for unlawful discrimination. That being the case, no reasonable inference of unlawful motive may be drawn from the mere wording of the suspension letters. Moreover, there is no evidence that the Respondent revisited its audit for any other driver. Fertil and Nicolas were not entitled to preferential treatment—in comparison to other employees who stole fares—just because they engaged in union activity.

The Respondent's slightly different treatment of two other employees—Desir and Etienne—does not support a finding of unlawful discrimination because those two other drivers were situated differently than Fertil and Nicolas. When Desir and Etienne were confronted with their fare delinquencies, they alleged that they had turned their money over to a supervisor, which raised a possibility that the supervisor may have stolen the fares. If such a scenario had taken place, the potential dishonesty by the supervisor—and the potential lack of culpability on the part of Desir and Etienne—would have been undetected by Respondent's audits.[9] Therefore, unlike Fertil and Nicolas, Desir and Etienne gave the Respondent a reason to investigate further before imposing discipline. No inference of unlawful discrimination arises from differences in treatment between or among employees who are not similarly situated. See, e.g., *Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672, 674 (2004); *Hoffman Fuel Co*., 309 NLRB 327, 329 (1992).[10] The Act does not make it unlawful for an employer to exercise reasonable judgment when deciding to take different types of investigative actions for different employees, especially when the employer, as here, must take prompt action to address serious misconduct involving a large number of employees. To the contrary, the Act permits a respondent to make reasonable managerial judgments about how to respond to different situations.[11] Moreover, the record also demonstrates that the explanations presented by Etienne and Desir warranted further investigation for a much more compelling reason, which had no relevance to the purported justification asserted by Fertil and Nicolas: Etienne and Desir attributed their fare discrepancies to a supervisor's potential dishonesty. It is not unlawful discrimination for an employer to treat more seriously claims of theft by a supervisor, in comparison to reports of mechanical problems with a fare machine. It is also significant that, putting aside Respondent's follow-up actions regarding a supervisor's alleged responsibility for Etienne's and Desir's deficiencies, the Respondent ultimately gave Etienne and Desir the same options made available to Fertil and Nicolas. Etienne and Desir agreed to make repayment to Respondent and they were retained. Fertil and Nicolas chose not to make repayment and—like other drivers who made the same choice—they were discharged.

In sum, the record establishes, consistent with the judge's findings, that the Respondent satisfied its burden of proof under *Wright Line* because the evidence shows that Fertil and Nicolas were treated in the same manner as other delinquent employees who refused to repay stolen fares. In my view, this warrants dismissal of the allegations that Respondent discharged Fertil and Nicolas because of antiunion discrimination in violation of Section 8(a)(3) of the Act. Accordingly, I respectfully dissent.[12]

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not recall Rowe, and did not otherwise aver that the manifests cast doubt on the audit's accuracy as to Fertil and Nicolas.

[9] My colleagues speculate that Fertil's and Nicolas' purported deposits also might not have been detected by the audit. Fertil's and Nicolas' primary demand was that the Respondent should pull the manifests to prove to their satisfaction that they were indeed short. The manifests were examined during the audit. Thus, the crux of their contention was that the legitimate reasons for their shortage would indeed have been detected by the audit. Again, even if one disregards Hernandez' credited testimony, and even if the fare machine was defective in a manner that could have escaped detection in the audit, this would have likewise affected similarly situated drivers who were not shown to have engaged in protected activity, and there is no reasonable basis for finding that such a scenario supports the allegations of unlawful discrimination in the instant case.

[10] My colleagues cite *Pollock Electric, Inc.*, 349 NLRB 708, 709 (2007), but in that case, the employer suspended one employee and discharged another "for effectively the same conduct."

[11] See *Publishers Printing Co*., 272 NLRB 1027, 1032 (1984).

[12] I join my colleagues in finding that the Respondent violated Sec. 8(a)(1) as set forth in footnote 3 of the majority opinion. However, I disagree with my colleagues' adoption of the judge's recommended broad cease-and-desist order. The Respondent is not a recidivist violator of the Act, so the issue is whether its unlawful conduct in this case alone warrants a broad order. In finding that it does, my colleagues cite the Respondent's 8(a)(1) violations during the organizing campaign, which I too find unlawful, and the two discharges, which I do not find unlawful. Without discounting the seriousness of the Respondent's unfair labor practices, they do not warrant a broad order, even assuming the discharges were unlawful. Cf. *Santa Barbara News-Press*, 359 NLRB No. 127, slip op. at 3 (2013) (issuing broad order for multiple

Dated, Washington, D.C. July 2, 2014

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT place you under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT threaten you that selecting the Transport Workers Union of America, AFL–CIO (the Union) or any other labor organization, as your representative would be futile.

WE WILL NOT coercively interrogate you about your union or other protected concerted activities.

WE WILL NOT solicit grievances from you and impliedly promise to remedy them in order to discourage you from selecting union representation.

WE WILL NOT ask you to campaign against the Union or any other labor organization.

WE WILL NOT expressly promise you benefits in order to discourage you from selecting union representation.

WE WILL NOT imply that we will give you unspecified benefits after the election in order to discourage you from selecting union representation.

WE WILL NOT threaten to replace you with part-time drivers if you vote for the Union or any other labor organization.

WE WILL NOT instruct you to vote against the Union or any other labor organization.

WE WILL NOT suspend, discharge, or otherwise discriminate against you because of your activities in support of the Union or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Renan Fertil and Yvel Nicolas full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Renan Fertil and Yvel Nicolas whole for any loss of earnings and other benefits resulting from their suspensions and discharges, less any net interim earnings, plus interest.

WE WILL compensate Renan Fertil and Yvel Nicolas for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for Renan Fertil and Yvel Nicolas.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharges, and WE WILL, within 3 days thereafter, notify the employees in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

WE WILL hold a meeting or meetings during working hours and have this notice read to you and your fellow workers by a responsible official of our company in the presence of an agent of the National Labor Relations Board, or, at our option, by a Board agent in the presence of such an official.

ALLIED MEDICAL TRANSPORT, INC.

The Board's decision can be found at www.nlrb.gov/case/12-CA-072141 or by using the QR

violations of Sec. 8(a)(1), (3), and (5) in a single case); *Five Star Mfg.*, 348 NLRB 1301, 1301–1302 (2006) (same), enfd. 278 Fed. Appx. 697 (8th Cir. 2008); *Trailmobile Trailer, LLC*, 343 NLRB 95, 95 fn. 2 (2004) (same). For similar reasons, I also would not require a reading of the notice.

code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Marinelly Maldonado and *Shelley Plass, Esqs.,* for the Acting General Counsel.

Lydia Cannizzo, Esq. (Cannizzo & Chamberlin, PA), for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in Miami, Florida on August 15 and 16, 2012. The underlying charges were filed by the Transport Workers Union of America, AFL–CIO (the Union). The resulting complaint alleged that Allied Medical Transport, Inc. (AMT or the Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by: creating an impression of surveillance, and engaging in surveillance, of Union activities; stating that unionizing would be an exercise in futility; soliciting employees to reject the Union; promising employees benefits, if they rejected the Union; threatening to replace employees, if they unionized; interrogating employees; unilaterally changing its fare shortage disciplinary policy; and terminating Renan Fertil and Yvel Nicolas because of their Union activities.

On the entire record, including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, AMT, a corporation, with principal places of business located in Hollywood and Lauderdale Lakes, Florida (the Hollywood and Lauderdale Lakes facilities), has provided public transportation services under the Americans with Disabilities Act (ADA) to clients living in Broward County, Florida. Annually, it purchases and receives at its Hollywood and Lauderdale Lakes facilities goods valued in excess of $50,000 directly from points located outside of the State of Florida.[1] Accordingly, it admits, and I find, that it is an employer engaged in commerce, within the meaning of Section 2(2), (6) and (7) of the Act. It also admits, and I find, that the Union is a labor organization, within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

AMT Medical is headed by: Wayne Rowe, Chief Executive Officer (W. Rowe); and Rashell Rowe, President (R. Rowe). It provides transportation under the ADA to qualified individuals with disabilities living in Broward County, who cannot use mainstream public transportation. (R. Exh. 1). It receives daily route assignments from Broward County, which describe, inter alia, client itineraries, routes, pick-up and drop off times and fares. Drivers begin their shift by picking up vehicles and assignments at the facilities; they end their workday by returning their vehicles and depositing collected fares into an automated kiosk.[2]

B. Union's Campaign

In June 2011,[3] the Union began organizing AMT's drivers, dispatchers and mechanics. George Exceus, Lead Organizer, held weekly offsite meetings during the campaign.

1. October 26 telephone call

Allan Toby, driver and internal Union campaign leader,[4] credibly testified that W. Rowe telephoned him on October 26. He recounted this conversation:

> [W]e had a [Union] meeting . . . the night before and Wayne [Rowe] asked me how come he wasn't invited to the meeting. . . . I explained . . . that . . . it wasn't a union yet . . . [and] that the reason that we were meeting was to explore . . . having better working conditions, to which he told me that nothing was going to change. . . .

(Tr. 96) (grammar as in original).

W. Rowe cursorily admitted telephoning Toby on several occasions, but did not specifically address the above-described call. He generally denied, however, classifying unionization as futile or implying that he was watching employees' Union activities.

For several reasons, I credit Toby's account. Concerning demeanor, he was forthright, even-keeled, and highly cooperative. His testimony was detailed and his recall was potent. W. Rowe, conversely, failed to expressly recall the conversation and only offered a general denial. This denial was, however, procured by a highly leading interrogation by counsel, which rendered it worthy of only minimal, if any, weight. See (Tr. 410).

2. November union meeting

Paul Beauvais, a driver, credibly testified that, in November, he attended a Union meeting at the Comfort Inn near the

[1] It has since closed its Hollywood and Lauderdale Lakes facilities, and opened a single Pompano, Florida facility.

[2] The automated fare collection kiosk is an ATM machine, which involves drivers entering a PIN code, depositing fare moneys and receiving a receipt, which is affixed to their assignment and submitted to supervision.

[3] All dates herein are in 2011, unless otherwise stated.

[4] He initiated the campaign, passed out union literature, solicited workers and served as a union observer.

Lauderdale Lakes facility. He stated that, when he arrived, he saw W. Rowe seated in a Toyota Sequoia parked 10 feet from the hotel's entrance.

Nicolas credibly testified that he attended the Comfort Inn meeting and saw W. Rowe parked by the entrance. He recalled W. Rowe summoning him over and recounted this exchange:

> And he [said] . . . I hear[d] you guys [are] hav[ing] a union meeting. . . . He [said] . . . the Union [is] not going to be able to do anything for you guys. . . . And Mr. Rowe [asked] . . . what [are] they . . . going to do for you guys? And I t[old] . . . him . . . the pay is not enough; we never have a good health insurance; then we never get vacation . . . so the Union offer us this stuff. And Mr. Rowe repeat[ed] . . . I'm the owner. . . . If I don't agree with the Union, they're not going to be able to do anything. And I tell him . . . we're going to try. And he was like . . . why don't you guys organize a group of drivers because I [told] . . . him when we have something wrong over there, we don't have . . . [some]one to talk to. He [told] . . . me why don't you guys organize a group of drivers?

(Tr. 225) (grammar as in original). He stated that, after he left, W. Rowe continued to linger.

W. Rowe testified that the Lauderdale Lakes facility's parking lot is near the Comfort Inn. He stated that he errantly believed that the Union meeting was being held in his parking lot, and wanted to confirm that his fleet was secure. He recalled seeing Nicolas and having a perfunctory conversation, but, failed to provide a detailed account. He did, however, generally deny engaging in surveillance, stating that unionizing would be a futile effort, or soliciting workers to abandon the Union.

For several reasons, I credit Nicolas' account. Concerning demeanor, he was open, straightforward and believable. He had a strong recall and was consistent. His testimony was partially corroborated by Beauvais. W. Rowe, conversely, provided only scant detail, and solely offered a generalized denial of wrongdoing. This denial was, as noted, prompted by a leading interrogation, which rendered it worthy of only de minimis weight. (Tr. 410–411). Moreover, if W. Rowe were solely concerned with protecting his fleet, it is implausible that he would have stationed himself at the Comfort Inn, in lieu of viewing the scene from his own facility.

3. November 28 telephone call

Toby credibly testified that, on November 28, he received another call from W. Rowe. He recounted this exchange:

> [H]e reminded me that there was a time that we were pretty much like a family. . . . He also told me that the drivers . . . looked up to me . . . and suggested . . . I should talk to them about voting against the Union. . . .
>
> He just said . . . I was instrumental in doing this and I never denied that I was the person who initiated that.

(Tr. 97). W. Rowe did not specifically testify about this call; he solely denied any wrongdoing.

For the many reasons previously cited, I credit Toby's account. As stated, he was a highly credible witness, who possessed a sharp recall. W. Rowe, as noted, failed to testify about this specific conversation and his generalized denial was prompted by a leading interrogation.

4. December 1 telephone calls

Adrys Etienne, another driver, testified that, on December 1, he received a phone call from W. Rowe. He described this conversation:

> [H]e . . . [asked] me if [I was] . . . going to vote tomorrow. I said no. . . . He said why? I said I don't have time. . . . And he [said] . . . you have to go vote . . . if you don't vote, the Union is going to win. If you vote, you have to vote no. . . . He [said] . . . [g]ive me some time to fix everything . . . he . . . has the future from the County; is the one that can help us. I [said] . . . but we work for you for a long time, you don't do nothing for us. . . . He [said] . . . you have to go vote . . . no.

(Tr. 56–57) (grammar as in original).

Beauvais testified that, on December 1, he also received a phone call from W. Rowe. He recalled this exchange:

> It was about the meeting [he] . . . had about . . . the Union. . . . [H]e asked me how . . . his meeting [was] and I said . . . there was something he said . . . that . . . all drivers didn't like, which is . . . we [are] all just drivers, just bus drivers. And I told him I was offended. . . .
>
> He said let's talk about our Union. . . . He [asked] . . . if I really think the Union is a good thing. . . . And I told him the Union is the only one that's there for us right now. . . . He said no, the Union is not there yet. . . . There's something you can do about the Union because the Union is not going to do anything. . . .
>
> And he kept telling me the Union is not good . . . because if the Union is there, we're not going to be able to call him anymore, we'll be talking to the Union directly, not him anymore. . . .
>
> [H]e . . . want[ed] us to vote no . . . and [asked] if I . . . [could] talk to the other guys . . . to vote no against . . . [the] Union because he didn't want to; if we vote no, the money he has, . . . the money he was going to use for attorneys' fee[s], he can use it on us to give us some to help us with insurance and stuff. . . .
>
> It was about $200,000 . . . for attorneys' fees. . . .
> [H]e said that's his company. The Union will not be able to control him because that's his company and . . . he can always hire part-time drivers from the other company to be full-time drivers and let all of us that follow the Union go. . . .
>
> He said . . . we were just bus drivers and he can . . . hire some high school kids to do the job . . . we're not professional. . . .
>
> (Tr. 108–112) (grammar as in original).

W. Rowe did not specifically address these conversations. He did, however, explain that he told drivers at a meeting that they were more abundant than professionals, whose positions entailed significant education and training. He denied, however, engaging in any wrongdoing.

For the several reasons previously cited, I credit Etienne's

and Beauvais' accounts. They were credible witnesses, with strong recollections. Their demeanors were open and believable. W. Rowe, as stated, failed to specifically testify about these encounters, and his generalized denials were produced via a leading interrogation.

5. Election and certification

On December 2, the following employees (the unit) at the Hollywood and Lauderdale Lakes facilities selected the Union as their exclusive collective-bargaining representative:[5]

> All full-time and regular part-time drivers, mechanics and dispatchers . . ., excluding: all other employees, including security guards, confidential employees, and supervisors as defined in the Act.[6]

(GC Exh. 8).

C. Fare Audits and Disciplinary Actions

In June, Broward County changed the way that AMT was paid. At that time, it began deducting the fares[7] that drivers collected from the trip fees[8] that AMT received for transporting passengers.[9] This change resulted in a substantial decrease in revenues.[10] W. Rowe testified that this change prompted him to perform an audit, in order to verify that all fares were being submitted. He added that he previously neglected to adequately monitor fare submissions, and that the change required him to exercise greater vigilance. He noted that he had long suspected some irregularities in drivers' fare submissions. Two audits were, consequently, performed; the first covered a few drivers and spanned March to October, while the second covered all drivers and spanned March to December.[11]

1. Audits

a. Phase 1–March to October Audit

The results of the March through October audit are summarized below:

Category	Number
Total drivers delinquent in remitting fares	6
Drivers admitting delinquency, who were warned and agreed to repay[12]	3
Drivers denying delinquency, who resigned or were fired	3

(GC Exh. 4–5).

b. Phase 2–March to December Audit

The results of the March through December are summarized below:

Category	**Number**
Total drivers delinquent in remitting fares	64
Drivers admitting delinquency, who Were warned and agreed to repay	7
Drivers denying delinquency, who Resigned or were fired	4
Category	**Number**
Drivers found delinquent, whose Disciplines have been withheld pending bargaining with the Union	49
Other[13]	4

(GC Exhs. 4–5).

Fertil and Nicolas were found delinquent during phase 2 of the audit. Their delinquency prompted their suspensions and discharges. W. Rowe acknowledged that he did not bargain with the Union or otherwise place it on notice before undertaking phase 2 of the audit, or taking any connected disciplinary actions. He admitted that phase 2 of the audit was unique, in the sense that AMT had never previously audited all drivers. He agreed that past audits were vastly more limited in scope and duration.

2. Fare Collection Rules

All employees receive an employee handbook, which discusses fare remission rules. Section 17.4, *Fare Collection*, states that:

> AMT drivers will collect from clients, any required fares. . . .
>
> Drivers will maintain a record of fare collection . . . and . . . submit deposit receipts for the fares collected.
> Fares must be deposited in the fare validating machine. . . . If a driver does not deposit fares collected . . . , the driver will be charged double . . . on the first offense. The driver will be terminated on the second offense. . . .

(R. Exh. 7 at 31). Section 9.3, *Infractions*, provides a nonexhaustive list of terminable offenses, which includes theft-related violations (i.e. fare submission violations). (Id. at 16–17.) R. Rowe testified that drivers were advised that fare submissions were subject to audit. (R. Exh. 17.) AMT maintained a bulletin board, which advised drivers that fare theft was a terminable offense. (R. Exh. 5.)

3. Fertil's Suspension and Discharge

On December 21, Fertil received the following letter:

[A]n audit was done for fare monies collected from March . . .

[5] On December 12, Region 12 certified the Union as the unit's exclusive representative. (GC Exh. 9).

[6] There are approximately 142 employees in the unit.

[7] Fares equaled $3.50 per ride, unless the fare was waived. (R. Exh. 2).

[8] Trip fees ranged from $33.50 to $18.10 per trip. (Id.).

[9] AMT previously retained fares, in addition to receiving a trip fee for shuttling clients.

[10] This resulted in a monthly decrease in AMT's revenues of approximately $60,000. (R. Exh. 2).

[11] An outside auditor, Ronan Defranc, was hired in November to perform this phase of the audit.

[12] Toby, a key internal union organizer, was in this group. Following the phase 1 audit, he was again found delinquent during the phase 2 audit, which resulted in another repayment agreement and warning. (GC Exh. 4).

[13] The record failed to reveal what disciplinary measures, if any, these drivers received.

> to December . . . and it was found that some days you . . . did not [fully] drop the fare monies collected.
>
> Our audit showed that you owe a balance of $476.30. . . . We pulled manifest for December 14, 2011 and it shows where you were short $7.00 for that day and you accept that you are short on that day. You state that you drop your monies at all times and you wish to see all documentation to proof that you are short.
>
> You will be placed on suspension while we further our investigation. . . . If it is proven that you do owe these monies you will be responsible for paying it back or criminal charges will be bought against you and at that time we will make a determination whether or not we wish to continue your employment. . . .

(GC Exh. 2) (grammar as in original).

a. Fertil's Account

Fertil testified that, on December 21, he was summoned to a meeting with D. Rowe and Human Resources Manager Alicia Burnette-Brown. He indicated that W. Rowe was not physically present, but, participated telephonically. He stated that he was informed about the fare delinquency, and asked to sign an admission and repayment agreement. He steadfastly denied liability. He averred that he was shown incomplete proof; he noted, however, that he would have repaid the entire delinquency, if he had been shown sufficient proof. He reported that he was suspended, while the matter was investigated. He indicated that he was never offered a staggered repayment plan. He related that, on December 26, he returned to the Lauderdale Lakes facility and signed a document, which denied culpability. (GC Exh. 2).

Fertil stated that he collected four Union authorization cards, including his own. He added that he distributed Union flyers to coworkers in the Lauderdale Lakes parking lot, and averred that Latoya White, Route Supervisor,[14] observed his activities.[15] He indicated that he attended 5 union meetings, and encouraged employees to support the Union at these meetings.

b. AMT's Position

W. Rowe testified that Fertil was told that, if he admitted his transgression and agreed to repay the missing funds, he would remain employed. He added that the audit conclusively demonstrated that Fertil, along with roughly half of the drivers, failed to remit all fares. He noted that he would have offered Fertil a repayment plan, if he accepted accountability. He denied knowing that Fertil supported the Union.[16]

Diandre Hernandez, Manager, testified that she met with Fertil concerning the fare shortage twice. She stated that he agreed to repay the December 14 shortfall, but, refused to repay other moneys. She stated that, although he asked her to assemble his fare records, he never followed up to set up an appointment to review these records. She averred that she told him that, if he repaid the moneys, he would be retained. She conceded that AMT never advised the Union of its decision to suspend him, or regarding its implementation of discipline following the audit.

4. Nicolas' Discharge

On December 27, Nicolas received this letter:

> [A]n audit was done for fare monies collected from March . . . to December . . . and it was found that some days you . . . did not drop the fare monies collected.
>
> You state that you have always dropped all the fare monies so you will be placed on suspension while we further our investigation. . . . If it is proven that you do owe these monies you will be responsible for paying it back or criminal charges will be bought against you and at that time we will make a determination whether . . . we wish to continue your employment. . . .

(GC Exh. 3) (grammar as in original). Nicolas' missing fare moneys only totaled $249.15, including interest. (GC Exh. 4).

a. Nicolas' Account

Nicolas recalled W. Rowe telephoning him in December about the delinquency; he recounted denying any wrongdoing. He explained that the fare collection machine often failed to work properly. He stated that he was later summoned to a meeting with D. Rowe, where W. Rowe participated via speakerphone. He recalled proclaiming his innocence and imploring them to check their records. He averred that he was not allowed to repay the missing fares, and was subsequently not placed on the schedule.

Nicolas testified that he served as a Union observer at the election, handed out union flyers to employees on 7 occasions, and collected approximately 30 union authorization cards. He stated that, when his shift ended, he consistently removed his uniform shirt and exposed his union T-shirt. He added that he spoke on behalf of the Union at various meetings.

b. AMT's Position

W. Rowe testified that he reported Nicolas' shortage to the Hollywood Police department. He stated that Nicolas said that he would repay the moneys on the Friday after the meeting, but, never appeared, which resulted in his removal from the schedule. He contended that, if the moneys had been repaid, Nicolas would have been retained. He acknowledged that AMT never advised the Union of its decision to suspend, and later fire, Nicolas.

Hernandez testified that she spoke to Nicolas about his de-

[14] The complaint alleged White as a Sec. 2(11) supervisor and Sec. 2(13) agent. (GC Exh. 1(ee)). In its amended answer, AMT admitted her status. I find, accordingly, that she was a supervisor and agent.

[15] Because AMT, without explanation, failed to call White to rebut this testimony, I credit Fertil's account, which was forthright and believable. See *Douglas Aircraft Co.*, 308 NLRB 1217 (1992) (failure to call a witness "who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference . . . regarding any factual question on which the witness is likely to have knowledge.").

[16] Based upon the reasons previously cited, I do not credit his claim that he was unaware of Fertil's union activity.

linquency twice. She added that, although he denied the transgression, his denial was implausible, given that the fare collection machine accurately counted submitted moneys. She stated that Nicolas initially committed to repaying the deficient moneys. She added that, although he never came in to repay the moneys, he eventually returned to pick up his last paycheck. She related that he was never offered a payment plan because he initially committed to repay the entire amount. She averred that she told Nicolas that, if he repaid the missing moneys, he would be placed back on the schedule.

5. Past Fare-Related Disciplines

The following chart describes past fare-related disciplines that were not associated with the audits at issue herein:

Date	Employee	Amount of Missing Fares	Discharge Threatened	Employee Conceded Guilt, Retained and Offered Repayment Plan
May 24	T. Wilson	$5097.40	Yes	Yes; agreed to repay $150 per paycheck[17]
July 21	G. Charles	$454.30	Yes	Yes; agreed to repay $75 per paycheck
Oct. 21	J. Desir	$84.15	Yes	Yes; agreed to repay monies[18]
Nov. 17	J. Teal	Not provided	Not provided	Employee retained[19]

(GC Exhs. 4, 5, 13).

Wilson credibly testified that he was consistently aware that his fare submissions might be audited. He stated that he was allowed to keep his job and enter into a payment plan, after he admitted liability. He added that he knew that he could have been arrested for withholding fares.

D. Collective Bargaining

Karen Caputo, AMT's chief spokesperson in bargaining, testified that she began negotiations with the Union in February. She stated that Carl Martin represents the Union. She added that, in March, the parties had the following discussion about fare shortages and discipline:

> It was not resolved, but, I told Mr. Martin that I would go back to Mr. Rowe and . . . advise him to discontinue taking the deductions until there was . . . [a] resolution because Mr. Martin was very adamant about believing that it was an unfair labor procedure. And . . . I spoke to Mr. Rowe . . . and he took my advice.

(Tr. 344–345). Hernandez explained that, consequently, AMT ceased disciplining drivers, until the parties reached a resolution about the fare shortage issue.

III. ANALYSIS

A. Section 8(a)(1)

1. Impression of Surveillance[20]

AMT created an unlawful impression of surveillance. An employer creates an unlawful impression of surveillance, if reasonable employees would assume that their union activities are being monitored. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–1296 (2009). Where an employer tells employees that it knows about their union activities but fails to cite its source, such comments are unlawful because reasonable employees will suspect surveillance. Id. at 1296. However, if an employer tells employees that it learned of their union activities from a specific employee, such comments are generally lawful and do not lead to a rational presumption of surveillance. *Park 'N Fly, Inc.*, 349 NLRB 132, 133 (2007). On October 26, W. Rowe told Toby that he was aware that he had attended a Union meeting. On November 28, he told Toby that he knew that he had started the Union's organizing drive. These comments, which omitted a source, left Toby to reasonably assume that management was monitoring his Union activities.

2. Surveillance[21]

AMT engaged in unlawful surveillance at the Union's Comfort Inn meeting. An employer unlawfully "surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and thereby coercive." *Aladdin Gaming LLC*, 345 NLRB 585, 586 (2005). Indicia of coerciveness, include the "duration of the observation, the employer's distance from employees while observing them, and whether the employer engaged in other coercive behavior during its observation." Id. In November, W. Rowe parked his car 10 feet away from the Comfort Inn's entrance for a 30-minute period and watched, as drivers entered to attend a union meeting. His appearance was out of the ordinary, and, as will be discussed, was accompanied by other coercive statements. This scenario, thus, constituted unlawful surveillance.

[17] Wilson said that he spent the stolen fares on gambling. He was, thereafter, found arrears in submitting fares equaling $290.50 from May to November and, again, made restitution in order to keep his job. (GC Exh. 4).

[18] Desir was later found delinquent in submitting additional fare moneys of $2,249.50, and presently remains employed. (GC Exh. 4). His discipline, if any, has been held in abeyance, pending negotiations with the Union.

[19] Teal was later found arrears in submitting additional fare moneys in November and December. (GC Exh. 4). His discipline, if any, has been held in abeyance, pending negotiations with the Union.

[20] These allegations are listed under pars. 6(a), 8(a), and 14 of the complaint.

[21] These allegations are listed under pars. 7(a) and 14 of the complaint.

3. Futility of Bargaining and Unionizing[22]

AMT unlawfully told employees that unionizing would be futile. The Board has held that, barring outright threats to refuse to bargain in good faith with an incoming union, the legality of any particular statement depends upon its context. See, e.g., *Somerset Welding & Steel, Inc.,* 314 NLRB 829, 832 (1994). Statements made in a coercive context are unlawful because they, "leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore." *Earthgrains Co.,* 336 NLRB 1119, 1119–1120 (2001); see, e.g., *Smithfield Foods,* 347 NLRB 1225, 1230 (2006) (statement from highest official that company was in complete control of future negotiations was unlawful); *Aqua Cool*, 332 NLRB 95, 95 (2000) (statement that employees were unlikely to win anything more at the bargaining table than other employees unlawfully implied that unionizing would be futile). On October 26, in reply to Toby stating that employees were seeking "better working conditions," W. Rowe told him that, "nothing was going to change." In November, W. Rowe told Nicolas that the "Union [is] not going to be able to do anything for you guys." On December 1, W. Rowe told Beauvais that, "the Union is not going to do anything," and "will not be able to control him." These statements, which were accompanied by threats, surveillance, and interrogation, collectively communicated that unionization would be a futile act.

4. Interrogation[23]

AMT unlawfully interrogated employees. In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board held that these factors control whether an interrogation is unlawful:

> (1) The background, i.e., is there a history of employer hostility and discrimination?
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
> (3) The identity of the questioner, i.e., how high was he in the company hierarchy?
> (4) Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
> (5) Truthfulness of the reply.

Id. at 939. In applying these factors, however, the Board concluded that:

> In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

Id. at 940.

On December 1, W. Rowe asked Etienne whether he was voting in the upcoming union election. On the same date, he asked Beauvais what he thought about management's preelection meeting and the Union generally, and whether he was willing to campaign against the Union. These queries, which were accompanied by other unlawful comments and made by AMT's leader, sought to expose Etienne's and Beauvais' respective commitments to the Union, and were, accordingly, highly coercive.

5. Soliciting Grievances[24]

AMT unlawfully solicited employees' grievances. In *Reliance Electric.*, 191 NLRB 44, 46 (1971), the Board held as follows:

> Where . . . an employer, who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, . . . there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.

In November, while engaging in surveillance at the Union's Comfort Inn meeting, W. Rowe asked Nicolas to organize a group of drivers to talk to him directly about their grievances. Given that there is no evidence that W. Rowe previously solicited employee concerns, his invitation to form a grievance committee was unlawful and designed to persuade employees that unionization was unwarranted. See, e.g., *Center Services System*, 345 NLRB 224, 232 (2005) (owner told employees, "if you have any problems with the company, I'm the president . . . you need to discuss it with me"); *Federated Logistics & Operations*, 340 NLRB 255, 265–266 (2003) (supervisor told employee that problems should be brought to management's attention).

6. Soliciting Campaign Assistance[25]

AMT unlawfully solicited drivers to campaign against the Union. "[W]here an employer solicits employees to campaign against union representation . . . such solicitation violates Section 8(a)(1) without reference to whether the solicited employee's union sentiments are known. . . ." *Allegheny Ludlum, Inc.,* 333 NLRB 734, 741 (2001), enfd. *Allegheny Ludlum Corp. v. NLRB,* 301 F.3d 167 (2002). On November 28, W. Rowe impored Toby to persuade his coworkers toreject the Union. On December 1, he lobbied Beauvais to do the same.

7. Promising Benefits[26]

AMT unlawfully promised to award employees benefits, if they rejected the Union. An employer violates the Act, when it promises to award employees benefits, in order to discourage their unionization efforts. See *Curwood, Inc.*, 339 NLRB 1137,

[22] These allegations are listed under pars. 6(b), 7(b), 9(a), and 14 of the complaint.

[23] These allegations are listed under pars. 9(e) and 14 of the complaint.

[24] These allegations are listed under pars. 7(c) and 14 of the complaint.

[25] These allegations are listed under pars. 8(b), 9(d), 9(f), and 14 of the complaint.

[26] These allegations are listed under pars. 9(b) and 14 of the complaint.

1147 (2003). The danger inherent in a well-timed promise to grant a benefit is the implication that employees must disavow their union support, in order for the promise to be fulfilled. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). On December 1, W. Rowe told Beauvais that, if he persuaded drivers to reject the Union, he would spend the $200,000 that he had budgeted for post-election labor relations costs on increased benefits. This pledge violated the Act.

8. Implicitly Promising Benefits[27]

AMT also unlawfully implied that employees would receive unspecified benefits, if they rejected the Union. The Board has held that, when an employer solely asks for a chance to prove itself, without suggesting that benefits would be forthcoming after the election, such commentary is lawful. See *Noah's New York Bagels,* 324 NLRB 266, 267 (1997), citing *National Micronetics*, 277 NLRB 993 (1985). However, employer requests for a chance to prove itself, which are accompanied by express or implied promises of benefits, are unlawful. See, e.g., *Reno Hilton Resorts Corp*., 319 NLRB 1154, 1156 (1995) (preelection plea to "give me a chance and I'll deliver" is unlawful); *Sunset Coffee & Macadamia Nut Co-O of Kona,* 225 NLRB 1021, 1021 (1976) (announcement that there would be "good news," after election is unlawful). On December 1, W. Rowe asked Etienne to "[g]ive [him] . . . some time to fix everything" and said that only he "is the one that can help." This statement, as noted, was accompanied by an express pledge to spend $200,000 on benefits, if the Union lost. Under these circumstances, W. Rowe's plea to "[g]ive [him] . . . some time to fix everything" was unlawful.

9. Replacement Threats[28]

AMT unlawfully threatened to replace employees, if they unionized. A statement is an unlawful threat, when it coerces employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a). In evaluating such statements, the Board:

> [D]oes not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act.

Sage Dining Service, 312 NLRB 845, 846 (1993); *Double D Construction Group,* 339 NLRB 303 (2003) ("test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction."). On December 1, W. Rowe threatened Beauvais that, "he [could] . . . always hire part-time drivers from the other company to be full-time drivers and let all [employees, who] . . . follow the Union go." This statement constituted an unlawful threat of retaliation.

B. Section 8(a)(3); Fertil's and Nicolas' Suspensions and Firings[29]

AMT did not violate Section 8(a)(3), when it suspended and terminated Fertil and Nicolas. Although the Agency made a prima facie showing of discrimination, AMT established that it would have taken the same personnel actions for permissible reasons.

1. Legal framework

The framework described in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), sets forth the appropriate standard:

> Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.
>
> If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."

Consolidated Bus Transit, 350 NLRB 1064, 1065–1066 (2007) (citations omitted).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for its actions are either false or not relied upon, it fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. However, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in its motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

2. Prima facie case

Counsel for the Acting General Counsel made a prima facie *Wright Line* showing that Fertil's and Nicolas' suspensions and discharges violated Section 8(a)(3). Concerning Fertil's union activity, he obtained 4 authorization cards, distributed literature, attended meetings and encouraged coworkers to support the Union. Regarding knowledge, supervisor White observed him distributing Union literature in the parking lot, which established institutional knowledge.[30] Concerning Nicolas' union activities, he served as an election observer, collected 30 authorization cards, distributed literature to coworkers, attended

[27] These allegations are listed under pars. 9(g) and 14 of the complaint.

[28] These allegations are listed under pars. 9(c) and 14 of the complaint.

[29] These allegations are listed under pars. 11, 12, and 15 of the complaint.

[30] See *State Plaza, Inc.*, 347 NLRB 755, 756–757 (2006) (supervisor's knowledge of union activities is imputed to the employer, unless credited testimony establishes otherwise).

meetings, advocated for the Union, and wore a union T-shirt. Regarding knowledge, W. Rowe observed him attending the Union's Comfort Inn meeting and engaged in a related discussion.[31] Lastly, as noted, there is extensive evidence of union animus, which can be imputed to both personnel actions; such animus includes numerous unlawful threats, statements and actions.[32]

3. Affirmative defense

AMT has shown that, even if an invidious motivation might have played some role in Fertil's and Nicolas' personnel actions, it would have nevertheless taken the same actions against them for permissible reasons. First, the audit that triggered their firings was wholly disassociated from the Union's organizing drive. The audit was prompted by Broward County disallowing AMT's retention of fare moneys. In the absence of this discrete event, AMT would not have undergone the massive and costly audit that ensnared Fertil and Nicolas.[33] Second, if AMT truly wanted to use the audit as a serendipitous way to remove union supporters, it would not have conducted the expensive and far-reaching audit that was performed. It would have, instead, undergone a precise audit focused primarily on known union adherents. Third, if AMT wanted to use the audit as mechanism to fire union supporters, its findings would not have broadly implicated 64 drivers, and would have narrowly indicted Fertil and Nicolas.[34] Fourth, AMT has historically treated all of its drivers, who were delinquent in submitting fare moneys, consistently. Specifically, drivers, who admitted liability and repaid their delinquency, remained employed; while drivers, who denied liability, were fired (i.e., Fertil and Nicolas).[35] This consistency shows that AMT would have taken the same actions against them, absent their union activities. Fifth, if AMT wanted to use the audit as a ploy to remove union adherents; it would have first aggressively zeroed in on Toby, the lead union organizer,[36] before turning its attention to lesser players, such as Fertil and Nicolas. Toby, who was twice caught delinquent in his fare submissions, was permitted to repay all moneys and retained. Given that Toby, the key union adherent, was permitted to remain employed after presenting AMT with 2 firing opportunities, one would be hard pressed to argue that Fertil and Nicolas, 2 lesser internal union organizers,[37] would not have also been retained, if they solely conceded liability.[38] Lastly, AMT's records demonstrated that Fertil and Nicolas were guilty of the underlying fare transgressions. In sum, I find that, where a company audits all of its drivers for business reasons disconnected from the Union's organizing drive, where any drivers found delinquent under this audit were retained if they agree to repay their debts (including the lead union organizer), and where 2 union adherents who refused to repay their debts under this audit are consequently fired, the company has abundantly shown that it would have consistently fired the 2 Union adherents, even in the absence of their protected activities. I find, accordingly, that AMT would have suspended and discharged Fertil and Nicolas, in the absence of their union activities.

C. Section 8(a)(5)[39]

AMT violated Section 8(a)(5), when its unilaterally changed its disciplinary policies and procedures concerning driver fare shortages, and disciplined drivers under this modified policy, without notifying the Union. In *San Miguel Hospital Corp.*, 357 NLRB No. 36, slip op. at 2 (2011), the Board described an employer's obligation to bargain with a newly established union as follows:

> Sections 8(a)(5) and (d) of the Act obligate an employer to bargain with the representative of its employees in good faith with respect to "wages, hours and other terms and conditions of employment." . . . Section 8(a)(5) also obligates an employer to notify and consult with a union concerning changes in terms and conditions of employment before imposing such changes. . . . When a majority of the unit employees have selected the union as their representative in a Board-conducted election, the obligation to bargain, at least with respect to changes in terms and conditions of employment, commences . . . [on] the date of the election.

(Id.) (citations omitted).

[31] AMT was also aware that he was a union election observer.

[32] Animus can also be adduced from the close timing between Nicolas' service as an election observer and his firing (i.e., a month). See *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003).

[33] This demonstrates that the audit and connected discipline was not engineered to eradicate union supporters, but, instead designed to address serious *nonunion* issues: decreased revenues; and driver dishonesty. Moreover, there is no evidence that AMT knew in advance that either Fertil or Nicolas were delinquent, and would, consequently, be ensnared by the audit.

[34] Or put another way, it's improbable that AMT would have potentially sacrificed so many others, in order to solely eliminate Fertil and Nicolas.

[35] Counsel for the Acting General Counsel's contention that AMT's failure to offer Fertil and Nicolas a staggered repayment plan demonstrates invidious treatment is unreasonable, given that these employees have consistently failed to acknowledge accountability or willingness to make restitution. It is logical that, as a prerequisite to offering a staggered payment schedule, an employee must first be willing to repay, which was not done. AMT cannot, as a result, be held accountable for failing to offer staggered payment schedules.

[36] On November 28, W. Rowe brazenly acknowledged to Toby that he knew that he was "instrumental" in the Union's organizing efforts.

[37] Fertil's union activities were somewhat minor, inasmuch as he solely collected 4 authorization cards and leafleted once. Although Nicolas performed more union activity, he played a vastly lesser role than Toby, who started the drive and was considered to be the Union's ringleader.

[38] I do not credit their claims that W. Rowe rejected their repayment offers. First, their claimed willingness to make restitution is inconsistent with their ongoing denials of liability and insistence that they be shown sufficient proof as a prerequisite to repayment. Second, their claimed willingness to repay is implausible, given that W. Rowe has consistently allowed *anyone to* repay stolen fares in order to keep their jobs, including the lead union organizer who was caught twice, a driver who admitted spending stolen fares on gambling and was later caught again, and drivers that were caught stealing thousands of dollars.

[39] These allegations are listed under pars. 10, 11, 13 and 16 of the complaint.

In order to trigger a bargaining obligation, a unilateral change must be material, substantial, and significant. *Crittenton Hospital*, 342 NLRB 686 (2004). A change will not, however, constitute an unlawful unilateral change, when it narrowly addresses a newly arising condition encompassed by a preexisting rule. See *Goren Printing Co.*, 280 NLRB 1120 (1986) (very limited fine tuning of preexisting rules). A bargaining obligation arises, however, when an employer enforces an unchanged rule in a more rigorous manner. See, e.g.*, Vanguard Fire & Supply Co.*, 345 NLRB 1016 (2005) (changing from lax to stringent enforcement).[40]

AMT, by significantly tightening its enforcement of its preexisting fare shortage policies and procedures, enacted a material, substantial and significant change in the unit's terms and conditions of employment. Specifically, it abruptly went from a loose system, where drivers' fare submissions were generally not policed, audits were infrequent and limited in scope, and few drivers were subjected to discipline; to one where all fare submissions for a 10-month period were scrutinized under a comprehensive audit. This modification resulted in every driver being audited and roughly half of them being subjected to disciplinary actions and repayment obligations. The scope of this audit was so significant that W. Rowe needed to hire an outside contractor to perform it because his in-house staff was incapable. Such heightened scrutiny caused substantial driver anxiety, increased their disciplinary risk, elevated their financial liabilities, and decreased their job security. This change, as a result, constituted a material, substantial, and significant modification of the unit's terms and conditions of employment.[41]

Given that it is undisputed that AMT unilaterally took these actions without notice or bargaining, this change violated Section 8(a)(5).[42]

CONCLUSIONS OF LAW

1. AMT is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and at all material times was, the exclusive bargaining representative for the following appropriate unit:

> All full-time and regular part-time drivers, mechanics and dispatchers employed at the AMT's Pompano, Florida facility, excluding all other employees, security guards, confidential employees and supervisors as defined in the Act.[43]

4. AMT violated Section 8(a)(1) of the Act by:

(a) Creating the impression amongst employees that it was engaging in surveillance of their Union or other protected concerted activities.

(b) Engaging in surveillance of employees' Union or other protected concerted activities.

(c) Telling employees that it would be futile for them to select the Union as their collective-bargaining representative.

(d) Interrogating employees about their Union or other protected concerted activities.

(e) Soliciting and impliedly promising to remedy employees' grievances, in order to discourage them from selecting the Union as their collective-bargaining representative.

(f) Soliciting employees to campaign against the Union.

(g) Expressly promising employees benefits, in order to discourage them from selecting the Union as their collective-bargaining representative.

(h) Impliedly promising employees unspecified benefits, in order to discourage them from selecting the Union as their collective-bargaining representative.

(i) Threatening to replace employees with part-time drivers, if they selected the Union as their collective-bargaining representative.

5. AMT violated Section 8(a)(1) and (5) of the Act by unilaterally changing its disciplinary policies and procedures concerning driver fair shortages.

6. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that AMT committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

AMT is required to, upon request by the Union, rescind the modified disciplinary policies and procedures concerning driver fare shortages connected to the March to December audit, restore the status quo ante, and engage in bargaining over these matters. Restoration of the status quo ante includes: expunging all reports, memoranda, disciplinary actions and termination notices, including the suspensions and terminations of Fertil, Nicolas, Gilbert Common, Inadil Forestal, and similarly-situated employees disciplined under the March to December

[40] See also *Garney Morris, Inc.*, 313 NLRB 101, 119–120 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995) (unilaterally implementing a new, more detailed disciplinary warning form); *Migali Industries*, 285 NLRB 820, 821 (1987) (unilaterally changing from oral to written warnings for absenteeism and tardiness, even though no discipline issued pursuant to changed procedure).

[41] It is noteworthy that these issues are well-suited for bargaining. For example, bargaining might encompass, inter alia: the level of liability requiring full and immediate lump sum restitution; the level of liability permitting a staggered payment schedule, and how the schedule would be calculated; payroll deduction issues; how recidivism could be addressed; the time period covered by fare audits; the frequency of fare audits; disciplinary levels for violators; and the propriety of "random" audits versus "probable cause" audits.

[42] In *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), the Board modified extant law, and held that employers must bargain with the collective-bargaining representative of their employees *prior to* the implementation of all discharges, demotions and suspensions. The Board held, however, that this decision, which was dated December 14, 2012, was not retroactive. Therefore, although this precedent is inapplicable herein, it should be used as guidance for AMT's future handling of discharges, demotions and suspensions, until such time as the parties finalize a collective-bargaining agreement, which addresses these issues in a grievance-arbitration procedure.

[43] As noted, following the Union's certification, AMT closed its Lauderdale Lakes and Hollywood facilities and opened the Pompano facility.

audit;[44] providing them written notice of such expunction; and notifying them that these disciplines will not be used against them in any manner. AMT shall offer Fertil, Nicolas, Common, Forestal and similarly-situated employees reinstatement, and make them whole for any loss of earnings and benefits. Backpay shall be computed on a quarterly basis from the date of their discharges to the date of their proper offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily under *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2010). AMT shall file a report with the Social Security Administration, which allocates backpay to the appropriate calendar quarters. *Latino Express, Inc.*, 359 NLRB No. 44 (2012). It shall further compensate affected employees for the adverse tax consequences, if any, associated with receiving one or more lump-sum backpay awards covering periods longer than 1 year. Id.

AMT must have a responsible official read the Notice to Employees to unit employees during working hours at a meeting or meetings, in the presence of a Board agent. A notice reading will likely counteract the coercive impact of the numerous instant unfair labor practices, which were committed by a high-ranking management official. See *Consec Security*, 325 NLRB 453, 454–455 (1998), enfd. 185 F.3d 862 (3d Cir. 1999) (participation of high-ranking management in ULPs magnifies the coercive effect); *Mcallister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004) ("[T]he public reading of the notice is an 'effective but moderate way to let in a warming wind of information and . . . reassurance. [citations omitted].'")

AMT will distribute remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with its workers in this manner. See *J Picini Flooring,* 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[45]

ORDER

Allied Medical Transportation, Inc., Pompano, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression amongst employees that it was engaging in surveillance of their Union or other protected concerted activities.

(b) Engaging in surveillance of employees' Union or other protected concerted activities.

(c) Telling employees that it would be futile for them to select the Union as their collective-bargaining representative.

(d) Interrogating employees about their Union or other protected concerted activities.

(e) Soliciting and impliedly promising to remedy employees' grievances, in order to discourage them from selecting the Union as their collective-bargaining representative.

(f) Soliciting employees to campaign against the Union.

(g) Expressly promising employees benefits, in order to discourage them from selecting the Union as their collective-bargaining representative.

(h) Impliedly promising employees unspecified benefits, in order to discourage them from selecting the Union as their collective-bargaining representative.

(i) Threatening to replace employees with part-time drivers, if they selected the Union as their collective-bargaining representative.

(j) Implementing new disciplinary policies and procedures concerning driver fare shortages, without bargaining with the Union. The appropriate bargaining unit is:

> All full-time and regular part-time drivers, mechanics and dispatchers employed at the AMT's Pompano, Florida facility, excluding all other employees, security guards, confidential employees and supervisors as defined in the Act.

(k) Failing and refusing to recognize and bargain with the Union regarding disciplinary policies and procedures concerning driver fare shortages, and by unilaterally discharging, suspending, and disciplining drivers under these new policies and procedures, without first notifying the Union and affording it an opportunity to bargain.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[46]

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Fertil, Nicolas, Common, Forestal and similarly-situated employees, who were fired, suspended, or disciplined as a result of the unlawful unilateral change in its disciplinary policies and procedures concerning driver fare shortages, their former jobs or, if such jobs no longer exist, offer substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of the Board's Order, make Fertil, Nicolas, Common, Forestal and similarly-situated employees whole for any loss of earnings and benefits suffered as a result of the unlawful unilateral change in its disciplinary

[44] Although the unilateral firings of Common, Forestal and similarly-situated employees were not expressly alleged under par. 11 of the complaint, these matters were covered by the underlying charges, fully litigated at the hearing, and addressed by pars. 10 and 16 of the complaint. Moreover, absent the inclusion of these employees, restoration of the status quo ante cannot be achieved.

[45] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[46] A broad cease-and-desist order is appropriate herein. See *Regency Grande Nursing & Rehabilitation Center*, 354 NLRN 530, 531 fn. 10 (2009).

policies and procedures concerning driver fare shortages, in the manner set forth in the remedy section of this Decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to any discharges, suspensions, warnings or other discipline connected to the unlawful unilateral change in its disciplinary policies and procedures concerning driver fare shortages, and within 3 days thereafter notify affected employees in writing that this has been done and that their disciplinary actions will not be used against them in any way.

(d) Within 14 days from the date of the Board's Order, file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for Fertil, Nicolas, Common, Forestal and any similarly-situated employees.

(e) Within 14 days from the date of the Board's Order, compensate Fertil, Nicolas, Common, Forestal and any similarly-situated employees for the adverse tax consequences, if any, associated with receiving one or more lump-sum backpay awards covering periods longer than 1 year.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the backpay amounts due under the terms of this Order.

(g) Upon request by the Union, rescind disciplinary policies and procedures concerning driver fare shortages, as well as rescind the disciplinary actions meted out under this modified policy, and restore the status quo ante.

(h) Upon request by the Union, bargain in good faith regarding the disciplinary policies and procedures concerning driver fare shortages applicable to the unit, and, if any agreement is reached, embody it in a signed writing.

(i) Within 14 days after service by the Region, physically post at its Pompano, Florida facility, and electronically distribute via email, intranet, internet, or other electronic means to its drivers, mechanics, and dispatchers, if it customarily communicates with these workers in this manner, who were employed by the Respondent at its Lauderdale Lakes, Hollywood, or Pompano, Florida facilities at any time since October 26, 2011, copies of the attached notice marked "Appendix."[47] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be physically posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 26, 2011.

(j) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which will be scheduled to ensure the widest possible attendance of drivers, mechanics and dispatchers, at which time the attached notice marked "Appendix" is to be read to employees by a responsible official of Respondent in the presence of a Board agent.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C., January 16, 2013.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT tell you that it would be pointless or useless to select the Transport Workers Union of America, AFL–CIO (the Union) as your representative.

WE WILL NOT create the impression that we are watching your Union activities.

WE WILL NOT watch your union activities.

WE WILL NOT interrogate you about your union activities.

WE WILL NOT ask you to tell us your problems at work, or promise to fix your problems at work, in order to persuade you to vote against the Union.

WE WILL NOT ask you to campaign against the Union.

WE WILL NOT promise to spend moneys budgeted for attorneys' fees on you after the election, in order to persuade you to vote against the Union.

WE WILL NOT imply that we will give you unspecified benefits after the election, in order to persuade you to vote against the Union.

WE WILL NOT threaten to replace you with part-time drivers, if you vote for the Union.

WE WILL NOT fail to bargain in good faith with the Union and as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

[47] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

All full-time and regular part-time drivers, mechanics and dispatchers employed at our Pompano, Florida facility, excluding all other employees, security guards, confidential employees and supervisors as defined in the Act.

WE WILL NOT fail and refuse to recognize and bargain with the Union by unilaterally changing policies and procedures concerning driver fare shortages, and consequently fire, suspend, and discipline employees under these amended policies, without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Renan Fertil, Yvel Nicolas, Gilbert Common, Inadil Forestal and any other similarly-situated employees, who were fired, suspended or disciplined as a consequence of us unilaterally changing policies and procedures concerning driver fare shortages, their former jobs or, if such jobs no longer exist, offer them substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, make Renan Fertil, Yvel Nicolas, Gilbert Common, Inadil Forestal and any other similarly-situated employees whole for any loss of earnings and benefits suffered as a result of the unlawful unilateral change in our disciplinary policies and procedures concerning driver fare shortages, in the manner set forth in the remedy section of this Decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to any discharges, suspensions or other discipline connected to the unlawful unilateral change in our disciplinary policies and procedures concerning driver fare shortages, and within 3 days thereafter notify affected employees in writing that this has been done and that this discipline will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for Renan Fertil, Yvel Nicolas, Gilbert Common, Inadil Forestal and any other similarly-situated employees.

WE WILL, within 14 days from the date of the Board's Order, compensate Renan Fertil, Yvel Nicolas, Gilbert Common, Inadil Forestal, and any other affected employees for the adverse tax consequences, if any, associated with receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, upon request by the Union, rescind disciplinary policies and procedures concerning driver fare shortages, as well as rescind the disciplinary actions meted out under this modified policy, and restore the former policy that was in existence immediately before we unilaterally changed these policies and procedures.

WE WILL, upon request by the Union, bargain in good faith regarding the disciplinary policies and procedures concerning driver fare shortages applicable to the unit, and, if any agreement is reached, embody it in a signed agreement.

WE WILL hold a meeting or meetings during working hours and have this notice read to you and your fellow workers by a responsible official of our company in the presence of an agent of the National Labor Relations Board.

ALLIED MEDICAL TRANSPORT, INC.